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IN THE

Supreme Court of the United States

October Term, 1965

No. 668

WILLIE BRISTOL WATSON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Willie Bristol Watson, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered the 1st day of June, 1965.

Opinions Below

The findings of fact and conclusions of law of the Honorable George W. Whitehurst, U. S. D. J., Judge of the United States District Court for the Middle District of Florida, Tampa Division dated June 23, 1964 and the judgment dismissing the action dated June 23, 1964 are printed in the record below.

The opinion and orders of the Court of Appeals, affirming the judgment of the Court below, denying the petition

and second petition for rehearing dated June 1, 1965, July 14, 1965 and August 6, 1965 respectively are set forth herein at Appendix A, B, and C respectively. The opinion is reported as *Watson* v. *United States,* 346 F. 2d 52.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C. A. 1254(1).

Questions Presented

1. Does the Full Faith and Credit Clause of our Constitution provide a rule of evidence which constitutes the recognition of a doctor as a medical expert by one State, as being in the nature of a judicial proceeding, as distinguished from a license to practice medicine, so as to make it mandatory for all other States to give him equal privilege as an expert witness in their Courts? [1]

2. Is State law controlling by virtue of section 457 of Title 16, U. S. C. A. so as to make the subject matter of the examination and treatment of a seaman a matter of discretion for the examining doctor, as held by the Court below on the authority of *Buchanan* v. *United States* (8th Cir.), 305 F. 2d 738 and *Ashley* v. *United States,* 215 F. Supp. 39, or does federal law control, as provided by section 249 of Title 42 U. S. C. A. which imposes a mandatory

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[1] Art. 4, §§ 1, 2

"Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Record and Proceedings shall be proved, and the Effect thereof."

"Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

obligation on the Government to provide prompt, adequate and proper treatment, as held by this Court in *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 58 S. Ct. 651 in 1938 and which has been the uniform concept of the law ever since up to and including June 25, 1963, in the case of *Hurte* v. *Socony-Mobil Oil Company,* 221 F. Supp. 885, irrespective of any provision of any State law?

3. Is the United States Government liable for injuries to a seaman proximately caused by its failure to render prompt, adequate and proper examination and treatment and its failure to inform a patient as to the danger of his condition and the need for immediate hospitalization and surgical intervention?

4. May negative testimony offered be considered as legally sufficient to sustain a Judgment over uncontradicted positive proof?

Reasons for Granting the Writ

1. The Court below has erroneously enunciated a revolutionary principle of law which discriminates between citizens of the United States—*i.e.*, doctors of equal standing, as to their right to be heard as experts on the unrealistic basis of the place of issuance of the medical license, which holding is repugnant to the American concept of equality of all citizens to access to our Courts on a common basis.

2. The Court below has erroneously enunciated a principle of law which gives the laws of each State controlling force over general and uniform federal law, in conflict with Congressional intent.

3. The affirmance by the Court below of the Trial Court's decision gives to Trial Judges the unduly excessive power to disregard uncontradicted evidence and to render judgment, unsupported by any proof.

4. The decision by the Court below is in conflict with the holding in the case of *Quinton* v. *United States,* 304 F. 2d 234.

Factual Statement

Petitioner suffered an amputation of his right leg on May 18, 1960.

Several months prior thereto, on February 23, 1960, petitioner presented himself to the Savannah, Georgia Marine Hospital. There he was examined by a United States Government doctor, one Dr. John B. Morris, who did not have a license to practice medicine in the State of Georgia, but had received one from the State of Kentucky in July, 1958.

Petitioner testified that when he first saw Dr. Morris he complained of pain in his left leg and was walking with a limp. Petitioner was corroborated by a fellow seaman, Nathaniel Noble, as to petitioner's limp at the time.

The uncontradicted evidence was that petitioner was suffering from arteriosclerosis involving said leg. Concededly, having such condition, the inference must necessarily be drawn that he was walking with a limp at the time.

The hospital record is devoid of any mention of arteriosclerosis or any examination of the leg.

Dr. Morris testified that he had no independent recollection as to Mr. Watson. Notwithstanding the fact that Dr. Morris had no recollection of what had taken place, he was permitted to testify at length, over repeated objections, as to what he usually did and what he believed had taken place.

He admitted that arteriosclerosis, vascular disturbance and blood pressure were important factors in determining the question of need for X-rays, hospitalization and surgical intervention, but that no record of any of these conditions were recorded by him.

Petitioner testified that Dr. Morris had told him that he could leave and return within thirty days, as well as thereafter if he obtained a further blank (Masters Certificate).

Petitioner was hospitalized on April 20, 1960, at which time surgical intervention proved unsuccessful as gangrene had set in. It was, therefore, necessary to amputate the leg.

Petitioner called Dr. Alan S. Robinson, a duly licensed doctor of the State of Florida, who qualified as an expert, whose testimony the Court refused to accept on the technical ground that the doctor was not licensed to practice medicine in the State of Georgia and, therefore, made a finding that petitioner had presented no medical proof to sustain his contention.

Petitioner made a tender of proof by Dr. Robinson that the condition which proximately resulted in the amputation of petitioner's leg existed at the time Dr. Morris first saw him. The tendered proof further set forth that the condition was such that it should have been recognized by any doctor had he made even a routine examination; that the condition required immediate hospitalization and surgery, which treatment would in all probabilities have prevented gangrene from setting in and would have tended to obviate any such serious condition as to require amputation.

The Court refused to accept Dr. Robinson's proffered testimony, holding that such was not expert testimony.[2]

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[2] The District Court as part of its Conclusions of Law held:

"D. In the absence of expert testimony in behalf of the plaintiff in a medical malpractice case, the Court is not justified in submitting the issue to the jury except where the deviation from the standard of care is so pronounced. Wilson v. Kornagay, 132 S. E. 2nd 791 Ga. 1963.

* * *

F. In suits for injuries, it is not only necessary that some negligent act of defendant be shown, but it must be shown that such negligent act caused or contributed to the resulting injury and that negligence was the proximate cause of the injury. In this case, plaintiff has wholly failed to show that the diagnosis, treatment and surgery accorded him was below the standard of care, skill and diligence under the conditions and surrounding circumstances at the times that plaintiff received such care and treatment or that if negligence did exist in connection with the examination of plaintiff on February 23rd and February 24th, that that negligence was the proximate cause of any injury or loss to him."

Argument

Dr. Alan S. Robinson acquired the status of a medical expert in the State of Florida and the denial to him of the right to give a medical expert opinion in the United States District Court in Florida as to treatment of a common ailment in Georgia constitutes a violation of the Full Faith and Credit Clause of the United States Constitution, Article 4, §§ 1, 2.

> *Pacific Employers Ins. Co.* v. *Industrial Accident Commission of State of California* (Cal. 1939), 306 U. S. 493, 59 S. Ct. 629;
> *Pink* v. *A. A. A. Highway Express* (1941), 314 U. S. 201, 62 S. Ct. 241.

The clear intent of the Federal Tort Claims Act was to grant to the citizens of the United States the benefits of remedial legislation.

Reference therein to State law was limited to accrual of the cause of action. Once the cause accrued, it is a matter for uniform administration to all citizens alike and not to be parcelled out, granted, or withheld on the basis of local State law.

> *Tessier* v. *United States,* 269 F. 2d 305;
> *Hungerford* v. *United States,* 307 F. 2d 99 (9th Cir.);
> *Bizer* v. *United States,* 124 F. Supp. 949.

The Court, in the case of *Quinton* v. *United States,* 304 F. 2d 234, speaks of the injustice of a rule which discriminates between litigants on the basis of locale. The reasoning therein is applicable though it treats with the question of the commencement of the running of the statute of limitations, the Court stating at page 236:

> "It is quite apparent that application of these diverse rules under Section 2401(b) would produce

> diverse results as to the effect of that section, and would thereby discriminate among claimants solely on the basis of where the operative facts giving rise to their claims arose. We cannot believe that this is what Congress intended."

The uncontradicted evidence established the absence of any records of the ailment which proximately resulted in the loss of petitioner's leg.

The uncontradicted testimony was that petitioner was denied prompt, adequate and proper treatment and hospitalization, that the truth as to his condition was never ascertained and, in any event, never told to the petitioner.

The proffered medical testimony was such as to establish malpractice with resultant injury.

Petitioner was denied a trial on the merits when the Court below affirmed the Trial Court's finding that there was no medical evidence offered to sustain petitioner's contention.

The United States Government hospitals have established a uniform standard of care as to the qualifications of doctors retained to administer in said hospitals, on the basis of generally accepted professional standards.

The decision by the Court below destroys the norm of generally "accepted professional standards" as having any meaning or effect and substitutes therein the unrealistic proposition that professional competency should be judged by the place where the license happened to have been granted, rather than the experience and standing of the doctor in question.

The Code of Federal Regulations are by law *prima facie* evidence of the text of the original documents and are required to be judicially noticed (49 Stat. 502, 67 Stat. 388; 44 U. S. C. 307, 311).

U. S. C. Title 42, Chapter 1, Public Health Service, Code of Federal Regulations, § 21.21 in subpart C, referring to appointment, specifically uses the following words "meets generally accepted professional standards as determined by the Surgeon General—".

In subpart K, treating with the subject of training, again we have the expression "—meets generally accepted professional standards as determined by the Surgeon General.".

It is quite apparent that the standard of care in all applicable phases in treating with Public Health Services is predicated on generally accepted professional standards, and in no instance is local State law mentioned or considered of the slightest importance or materiality.

To hold that the place of licensing of a doctor is determinative of his capacity to testify is in conflict with the whole tenure of Title 42, U. S. C. A. Public Health Service.

Prior to the present decision, causes predicated on malpractice by a United States employee were governed by a uniform federal concept of liability. *Tessier* v. *United States, supra,* and cases therein cited.

The present decision tends to overrule the holding in the case of *Tessier* v. *United States, supra.*

Dr. John B. Morris testified that he had no personal recollection as to any treatment given petitioner.

The testimony by Dr. Morris, accepted by the Trial Court over the objection of petitioner's counsel, constituted, at best, negative testimony, but a reading of the same will show that his testimony had no factual proof whatsoever.

The vascular disturbance which was the proximate cause of gangrene which caused petitioner to lose his leg was concededly present at the time Dr. Morris examined him.

The evidence established the fact that this condition was overlooked and not even recorded or mentioned in the hospital record prepared by Dr. Morris.

The Government's evidence established the fact that when surgery was resorted to, it was too late to prevent gangrene from setting in with the consequential loss of petitioner's leg.

Dr. Robinson proffered proof was that prompt, adequate and proper examination and treatment would have prevented gangrene and thus would have given petitioner a reasonable opportunity to save his leg from amputation.

Dr. Robinson testified in his deposition taken on January 24, 1964, that even a general practitioner would have observed that the petitioner had general arteriosclerosis and would have examined the circulatory system of the lower extremities (top of p. 141).[3]

Insofar as the Trial Court's decision was based entirely on negative testimony and the rejection of testimony by a competent medical expert on technical grounds only, the decision by the Court below constitutes a radical departure from well established federal concept, and will unquestionably deny to litigants in malpractice cases

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[3] Petitioner's argument can be summarized in the language contained in "Today's Health" (May, 1964) by the American Medical Association, 536 N. Dearborn Street, Chicago, Ill., as follows (p. 104):

> "For the patient with constriction of the femoral arteries, which feed the legs, the outlook was once grim: first, limb weakness, then, total loss of function. As blood supply dwindled, gangrene and amputation often followed. In an initial series of operations, Dr. George C. Morris, Jr., replaced the blocked arteries of 315 patients who faced amputation. With normal circulation restored, strength returned to their painful muscles, and gray flesh became pink. Instead of leaving the hospital on crutches or in wheelchairs, eight of ten walked out."

against the United States a fair and reasonable opportunity to be heard on the merits.

The applicable law is well settled and uniform, and has been consistently applied by our Courts from the time of the decision in the case of *The Fin MacCool*, 147 F. 123, 77 C. C. A. 349, cited with approval in *The Buenos Aires*, 5 F. 2d 425, wherein the Court quoted from the holding in *The Fin MacCool* case, *supra*, at page 430:

> "The case is one for the application of the rule of evidence that positive evidence is ordinarily to prevail over strictly negative evidence, and that when one or more witnesses testify that they saw an object or heard a signal upon a given occasion, their testimony is to prevail over that of a same number of witnesses, of equal candor, who testify that they did not see or hear it. There is, in such cases, no necessary conflict of evidence as to the fact in question. The observation of the fact by some of the witnesses may be entirely consistent with the failure of the others to observe it, or their forgetfulness of its occurrence. Horn v. Balt. & Ohio R. Co., 54 F. 301, 4 C. C. A. 346, 351; Rhodes v. U. S., 79 F. 740, 21 L. Ed. 644, 25 C. C. A. 186; Stitt v. Huidekoper, 17 Wall. 393."

The *Fin MacCool* case, *supra*, was again cited with approval as recently as June, 1962 in the case of *Allen N. Spooner & Son, Inc.* v. *Connecticut Fire Ins. Co.*, 206 F. Supp. 495 (1962) at 503.

Both cases of *The Buenos Aires, supra*, and *The Fin MacCool* case, *supra*, were cited with approval in the case of *The Elizabeth M. Baker*, 69 F. 2d 54. See also: *The Cape Franklin, The B. F. Guinan, The Ashbourne*, 39 F. 2d 971; *Wright* v. *Cobb Lighterage Co.* v. *New England Nav. Co.*, 204 F. 762.

CONCLUSION

It is respectfully submitted that the questions sought to be reviewed are of such magnitude and importance, not only to seamen and all persons entitled to the facilities of our Public Health Service, not only with relation to the remedial intent of the Federal Tort Claims Act, but to all litigants involved in malpractice suits, that the petition merits consideration and review by this Court.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX A

Opinion of Court Below

This is an appeal by a seaman from an adverse judgment in a suit based upon alleged malpractice of a doctor of the Outpatient Clinic of the United States Public Health Service Hospital.

The agreed facts are that the appellant, a 56-year-old shrimp boat captain, working out of Ft. Myers, Florida, went to the Outpatient Clinic of the Public Health Service Hospital in Savannah, Georgia on February 23, 1960; he there saw a Doctor Morris; the hospital records make reference to a complaint by appellant of his right arm, a diagnosis by the doctor following an X-ray of the elbow, that Watson was suffering from a rupture of the long head of the biceps for which surgery would be required; that appellant wished to make his own arrangements prior to admission to the hospital; he was given a duty-status slip marked "Not fit for duty" and "to return to clinic 3/2/60 for admission"; Watson returned to Tampa and took an additional trip lasting some six weeks; he returned without finishing the trip as planned, complaining of suffering from his right leg. He was found, on a local doctor's examination, to be suffering from high blood pressure, was given medication and sent back to the Savannah Public Health Service Hospital. He there was found to be suffering from arteriosclerosis obliterans. An arteriogram was done which showed an interruption of the flow of blood in the femoral artery of the right leg. It was decided that surgery was called for and an attempt was made to insert a bypass graft around the blocked portion of the artery. This attempt was unsuccessful and, thereafter, it became necessary to amputate Watson's right leg above the knee.

No negligence is complained of in the operation or any of the procedures following appellant's admission to the

Savannah Hospital on April 20, the second date of admission. The negligence charged relates to an alleged failure of Doctor Morris on the first admission. In addition to the above facts that are not in dispute, appellant contends that when he first went to the Outpatient Clinic he had a limp and complained of an injury to his right leg, but no examination was made by the doctor, either of his blood pressure or the possible existence of arteriosclerosis; that he was then told to return but was given no hint of the existence of any dangerous condition that would require any prompt return. It is contended that, had Doctor Morris made the proper physical examination in light of the alleged symptoms, the condition of arteriosclerosis obliterans would have been diagnosed on February 13th with better likelihood of success, thus saving the right leg.

[1, 2] The action having been brought under the Federal Tort Claims Act 28 U.S.C.A. § 1346(b), it is necessary to refer to the Georgia law with respect to liability for malpractice of surgery and medicine. The Georgia law requires that "[a] person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which a recovery may be had" 84 Ga.Code Ann. 924. Under the Georgia decisions, it is clear that in order to recover under this statute a plaintiff must overcome a presumption that the medical services were performed in an ordinary skilled manner; carry the burden of showing a want of due care, skill and diligence; and do so by the expert testimony of physicians or surgeons. Shea v. Phillips, 213 Ga. 269, 98 S.E.2d 552; Hollis v. St. Joseph Infirmary Inc., 108 Ga.App. 309, 132 S.E.2d 841; Hayes v. Brown, 108 Ga.App. 360, 133 S.E.2d 102. This heavy burden of recovery under the Georgia cases has been applied to the extent of the Appellate Courts' affirming

a summary judgment in favor of a defendant in such a malpractice act in the absence of a physician's affidavit to support the charge of malpractice. Hollis v. St. Joseph Infirmary Inc., supra.

The principal battleground here is the correctness of the trial court's finding of fact #6 to the effect that when appellant went to the Savannah Hospital on February 23 and 24th, 1960, he complained only about his arm, and did not "enter the hospital with a limp or complain to Doctor Morris of pain, numbness or coolness in his right" leg. The trial court expressly stated that this finding was "based upon the testimony presented and there inheres in this finding the matter of credibility of the witnesses."

Since appellant's entire case is posited on the proposition that Doctor Morris failed to exercise the required standard of care in failing to make the physical examination that would have disclosed his subsequently found arteriosclerosis obliteran, this finding, if supported, necessarily requires the affirmance of the trial court's judgment. The evidentiary basis of this finding was that Doctor Morris, who testified at the trial, identified the history from the records of the hospital and, based on the history, but without any independent recollection of the event, testified that he did not receive from Watson any complaint about his leg. He concluded this because this, he said, would have been a significant fact which he would have entered on the history as he took down the patient's complaints.

On the other hand, the trial court had before it the testimony of Watson, given by deposition, rather than in person, that he was limping with a sore right leg when he came to the Outpatient Clinic; that he complained of the condition of his leg; and that the doctor told him when he returned he would have an operation both for his arm and his leg. This testimony was supported, to some extent, by Watson's shipmate Noble, who testified at the trial that Watson had

been limping prior to his leaving the ship to go to the hospital. Noble's testimony at the trial was vague and unpersuasive in many respects. This must be the basis for the trial court's statement that its finding on this matter was "based upon the testimony presented and there inheres in this finding the matter of the credibility of the witnesses" unless the court meant particularly to credit Doctor Morris' credibility in his effort to reconstruct from the hospital records what had happened several years previous, since, as stated above, Watson himself did not appear and testify at the trial. Nor, for that matter, did his wife, who drove him from Ft. Myers to the hospital at the time of his visit to the Outpatient Clinic on February 13th.

The Government further points out that even though the trial court had determined that appellant had complained of the injury to his leg and that Doctor Morris had improperly neglected to make a sufficient examination of the cause of such injury Watson could not prevail in his case because of a lack of causal connection between such failure to make an adequate examination on February 13, and the ultimate loss of the leg in May. On this point, the trial court found in finding #9 "the only medical testimony adduced on the effect of the delay between February 24th and April 25th was that there was no causal relationship between the said delay and the failure of the bypass graft. The court finds that had the bypass graft been attempted in February 1960, there would have been, to a reasonable degree of medical certainty, no greater likelihood of success of this operation, nor would there have been, to a reasonable degree of medical certainty, any benefit derived by plaintiff through the use of conservative treatment even if same were to have been initiated in February of 1960."

[3] Upon carefully considering the testimony of the professional witnesses on the trial, we conclude that the Court had an adequate basis for this determination. Thus, it is

clear that, even granted that there was a failure to examine Watson in such manner as would have disclosed the arteriosclerotic condition of his right leg in February, 1960, no recovery would be warranted because such condition was of such a nature as to have, to a reasonable degree of medical certainty, resulted in the same ultimate loss of the limb.

[4] We conclude that the Outpatient Clinic or Hospital record used as the basis of Dr. Morris' testimony was properly considered by the trial court as warranting its conclusion that no complaint was made by the appellant at the time of his first visit. The positive testimony by the examining doctor that such a complaint would be considered by him as a "significant" complaint and that he uniformly entered all "significant" complaints on the medical history taken by him, fully warranted the acceptance by the trial court of the hospital record as excluding the theory advanced by the appellant. Moreover, as we have said, even though some negligence had occurred on this occasion, there was an ample evidentiary basis for the trial court's finding that a full and complete examination by Dr. Morris on February 13th would not have ameliorated to any significant degree the condition of appellant's leg that a few weeks later required the operation and amputation.

We have carefully considered appellant's additional supplemental brief filed after argument, together with the government's answer thereto. We conclude that no error occurred in the treatment of Dr. Robinson's testimony or in other rulings on admissibility of evidence.

The judgment is affirmed.

APPENDIX B

Order Denying Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21858

WILLIE BRISTOL WATSON,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

(July 14, 1965)

Before TUTTLE, Chief Judge, RIVES and BELL, Circuit Judges.

PER CURIAM: It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED. The petitioner's insistence, that since the alleged malpractice was on a federal enclave, the Georgia law does not apply, is answered by the statute, 16 U. S. C. A. 457. See *Buchanan* v. *United States*, 8 Cir. 1962, 305 F. 2d 738; *Ashley* v. *United States*, D. C. Neb. 1963, 215 F. Supp. 39, 43.

APPENDIX C

Order Denying Motion to File Second Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21858

WILLIE BRISTOL WATSON,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

Before TUTTLE, Chief Judge, RIVES and BELL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the Motion for leave to file a second Petition for Rehearing in the above-entitled and numbered cause be, and the same is hereby DENIED.